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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 432

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The majority and dissenting opinions of the specially constituted District Court (R. 12–22) are reported in 23 F. Supp. 810. The report of the Interstate Commerce Commisison (R. 6–9) is reported in *Dan E. Maher Common Carrier Application*, 3 M. C. C. 479.

JURISDICTION

The final decree of the District Court was entered July 9, 1938 (R. 29). Petition for appeal

was filed September 7, 1938, and was allowed the same day (R. 33). Jurisdiction is conferred on this Court by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 210, 219 (U. S. C., Title 28, Secs. 45 and 47a, Sup. III); Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (U. S. C., Title 28, Sec. 345), and by the Motor Carrier Act, 1935, Sec. 205 (h), c. 498, 49 Stat. 543, (U. S. C., Sup. I, Title 49, Sec. 305 (h)).

QUESTIONS PRESENTED

1. Is the appellee entitled to a certificate of public convenience and necessity under the provisions of Section 206 (a) of the Motor Carrier Act, 1935 (c. 498, 49 Stat. 543; 49 U. S. C., Sec. 306 (a))?

2. Assuming that the appellee is not entitled to such a certificate under the provisions of Section 206 (a) of the Act, should the Interstate Commerce Commission have considered his application under the provisions of Section 207 (a) of the Act and determined whether public convenience and necessity required the issuance of a certificate to the appellee?

3. Did the specially constituted district court have jurisdiction to review the order of the Commission denying the application of the appellee for a certificate of public convenience and necessity and directing that appellee be "notified and required" to cease and desist from operating in interstate commerce as a common carrier?

STATUTE INVOLVED

The provisions of the Motor Carrier Act, 1935 (c. 498, 49 Stat. 543; 49 U. S. C. 8), primarily involved, are found in Sec. 206 (a) of the Act which provides, in part, as follows:

> No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * *, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That * * * if any such carrier * * * was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect * * *. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such ap-

plication the continuance of such operation shall be lawful.

The pertinent provisions of the Motor Carrier Act, 1935, are set forth in Appendix A to this brief, *infra*, pages 56–66.[1]

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from a final decree of the United States District Court for the District of Oregon, entered July 9, 1938 (R. 29–30), which suspends in part, and in part annuls, cancels, and sets aside an order of the Interstate Commerce Commission, Division 5, entered on October 27, 1937 (R. 9–10). The Commission's order denied appellee's application under Section 206 (a) of the Motor Carrier Act, 1935, for a certificate of public convenience and necessity, and further ordered that he be "notified and required" to cease and desist from all operation in interstate commerce as a common carrier by motor vehicle.

1. PROCEEDINGS BEFORE THE COMMISSION

By application filed with the Commission on January 24, 1936, appellee sought a certificate of public convenience and necessity authorizing op-

[1] The statute will be referred to in the brief as "the Act" and the designation of the sections thereof will follow the numeration found in the statute as enacted (Act of August 9, 1935, c. 498, 49 Stat. 543, Secs. 201–227) rather than the numeration adopted in the Code (U. S. C. Sup. I, Title 49, Sections 301–327).

eration as a common carrier by motor vehicle of passengers and their baggage between Portland, Oregon, and Seattle, Washington, over U. S. Highway 99, and intermediate points thereon. On November 12, 1936; a hearing was held before a Joint Board and evidence taken.[2] The Public Utilities Commission of Oregon, the Oregon Bus Association, the Motor Coach Association of Washington, the North Coast Transportation Company, and certain rail lines appeared in opposition to the application (R. 7). The Joint Board's recommended order denying the application was stayed by order of the Commission April 24, 1937 (R. 6), and the questions involved were thereafter argued and submitted to the Commission, Division 5, for determination.

On October 27, 1937, the Commission handed down a report setting forth its findings of fact and conclusions (R. 6–9), and entered an order denying

[2] In order to use the experience and knowledge of local conditions possessed by State commissions, but to do so within the framework of a system permitting centralization of administrative control, Congress conferred jurisdiction over many matters arising under the Act to "Joint Boards" composed of one member from each State involved, nominated by the regulatory commission of the State from its own membership or otherwise, or by the Governor. Their duties, powers, and jurisdiction are the same as those of members and examiners of the Commission, and any order recommended by a Joint Board is subject to the same rules as an order recommended by a member or an examiner of the Commission. Motor Carrier Act, 1935, c. 498, 49 Stat. 543, Sec. 205 (U. S. C., Sup. I, Title 49, Sec. 305).

appellee's application, the denial to be effective December 10, 1937, and further ordering that the appellee be "notified and required" to cease and desist on or before December 10, 1937, from all operation in interstate commerce as a common carrier (R. 9–10). The effective date of the order was thereafter postponed by the Commission to January 10, 1938 (R. 10).

2. THE COMMISSION'S FINDINGS OF FACT

The pertinent findings of fact made by the Commission and included in its report may be summarized as follows:

Appellee's operations on June 1, 1935, and prior to May 29, 1936. The Commission found that from 1931 until May 29, 1936, *and on June 1, 1935,* appellee had been conducting an irregular, anywhere-for-hire operation in Oregon with occasional trips to points in Washington (R. 7). Operations in Oregon were conducted under an anywhere-for-hire permit issued by the Public Utilities Commission of Oregon, and appellee kept detailed records of his operations in Oregon for the purpose of making reports to the authorities of that State. Appellee kept no records of his operations in Washington for the reason that he made no reports to the authorities of that State (R. 8). In instances where trips were made to points in Washington, his records would show the destination point as Vancouver or Vancouver Bridge, the point at which the State of Washington was entered (R. 8).

The Commission's report and the record before this Court are silent as to whether or not he actually had authority from the State of Washington to operate therein.

During this period, appellee's operation consisted largely of the transportation of groups of employees from Portland to logging camps in Oregon and Washington. He obtained business principally through employment agencies at Portland where men were hired for work at the camps. He also transported baseball and basketball teams (R. 7). Trips were made at various times between 1933 and 1936 to the following points in the State of Washington: Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane (R. 8).

Although appellee's application alleged (R. 8) that on June 1, 1935, he was conducting regular-route operations on U. S. Highway 99 between Portland and Seattle and that he was serving all intermediate points, the Commission found that in 1935 only eleven, and between January and April in 1936 only six trips were made to points in Washington, the specific destinations not being revealed (R. 8). The Commission further found (R. 8) that there was no evidence of service at any time to most of the intermediate points on U. S. Highway 99. Many of the Washington points mentioned above are on other highways. For example, Cathlamet

and Deep River are on U. S. Highway 830; Raymond and Aberdeen are on U. S. Highway 101; Neah Bay is in the extreme northwestern corner of the State a considerable distance from any point on U. S. Highway 99 between Portland and Seattle; and Spokane is in the extreme eastern part of the State many miles from U. S. Highway 99 (R. 8). A map showing the location of the points in the State of Washington to which the appellee made trips at various times is included in this brief as Appendix B, *infra* page 61. The Commission also found *that prior to May 29, 1936, and since about 1933, appellee had made no trips to Seattle* and that there was no evidence that prior to May 29, 1936, he had carried passengers on return trips to Portland (R. 8). The Commission's report states that "U. S. Highway 99 probably was used for at least part of the distance on most, if not all, of applicant's trips to Washington" (R. 9).

In the conduct of the operation above described appellee used two vehicles of 10- or 11-passenger capacity. He published no tariff but based his charges on the mileage involved on each trip. He maintained no terminal facilities (R. 7, 8).

Appellee's operation on and after May 29, 1936. On May 29, 1936, appellee discontinued the anywhere-for-hire operations which he had theretofore, and on June 1, 1935, conducted as described above (R. 8) and inaugurated the operation which he was conducting at the time of the hearing be-

fore the Joint Board on November 12, 1936. Using a 25-passenger bus, purchased particularly for the new operation, and an auxiliary 10-passenger vehicle, he began a regular daily scheduled service between Portland and Seattle, as fixed termini, over U. S. Highway 99, serving intermediate points. Fares were based on a published tariff. Operations were carried on under the trade name "Interstate Busses," a trade name not theretofore used (R. 7).

The Commission concluded that the service instituted on May 29, 1936, was a new and different service from that previously conducted by appellee, and was instituted and had been conducted in contravention of the provisions of the Act, and that the evidence wholly failed to sustain appellee's claim that he was entitled to continue such service by virtue of his operation as conducted on June 1, 1935 (R. 9).[1]

3. PROCEEDINGS IN THE COURT BELOW

On December 15, 1937, appellee filed a bill of complaint in the court below, alleging that the evidence before the Commission showed that peti-

[1] Commissioner Lee concurred in part, agreeing with the majority that appellee's "regular route operation between Portland and Seattle does not come within the purview of the 'grandfather' clause." Nevertheless, he was of the opinion that a certificate should be issued authorizing continuance of the operation appellee "was conducting when the act was passed" (R. 9).

tioner was in *bona fide* operation as a common carrier by motor vehicles on June 1, 1935, over the routes and within the territory for which application had been made, and praying that the Commission's order be set aside, annulled, and enjoined on the ground that there was no evidence to support it and that the Commission had exceeded its statutory powers and had misinterpreted and misapplied the Motor Carrier Act, 1935 (R. 1-3). The bill of complaint also prayed that a three-judge district court be convened pursuant to the provisions of the Urgent Deficiencies Act.

The bill of complaint did not allege that public convenience and necessity required the continuance of the operation in which the appellee was engaged on and after May 29, 1936, that the appellee had offered any evidence before the Commission on the question of whether public convenience and necessity required the continuation of that operation, or that the Commission erred by not making a finding with respect to public convenience and necessity.

A district court of three judges was convened under the provisions of the Urgent Deficiencies Act and the cause was heard by that court on February 11, 1938. No evidence was introduced in the court below. The Commission's report and order were attached as exhibits to the defendants' answers, and the court below accepted the findings of fact contained therein as correct (R. 14). Cf. *Mississippi*

Valley Barge Line Co. v. *United States*, 292 U. S. 282.[4]

On June 16, 1938, the specially constituted District Court rendered an opinion in which the majority of the court held that it had jurisdiction to review the Commission's order, that so much of the order as denied the appellee's application should be suspended, and that the provision of the order directing that the appellee be notified and required to cease and desist from further operations should be set aside (R. 12–22). The majority of the court were apparently of the opinion (1) that although the applicant was not entitled to a certificate authorizing the service which he performed on and after May 29, 1936, he was entitled to a certificate which authorized the service which he was performing on and before June 1, 1935; and (2) that the appellee was denied his legal rights by the Commission because having determined that he was not entitled to a certificate under Section 206 (a) of the Act, the Commission failed to consider his application under Section 207 (a) of the Act and determine whether public convenience and necessity required

[4] In its findings of fact and conclusions of law (R. 24) the lower court states that "the parties hereto have stipulated that the Court should consider the evidence in this matter as found by the Interstate Commerce Commission" (R. 24–26). The record, however, fails to show any such express stipulation. The Commission's report in its entirety was attached as an exhibit to the defendants' answers (R. 6, 11) and defendants' case was submitted on the pleadings as a whole.

the continuance of the operation in which he was engaged.

Circuit Judge Haney filed a dissenting opinion (R. 22–24) in which he held that the portion of the Commission's order denying the application was negative in substance and form and that the court had no jurisdiction over it, but that the cease and desist order was affirmative and within the court's jurisdiction; that the Commission had properly construed the Motor Carrier Act, 1935, and had rightly held that appellee had abandoned the operations which he was conducting on June 1, 1935; that appellee was not entitled to a certificate; that the question of proof of public convenience and necessity under Section 207 (a) was not before the court; that the Commission had power to issue the cease and desist order; and that the bill of complaint should be dismissed.

On July 9, 1938, the District Court entered a decree suspending that part of the Commission's order which denied the application "until such time as the Commission either upon further hearing, or upon the record now in its possession, grants to the plaintiff a certificate delimited under the terms of the statute, or denies a certificate in conformity with the statutory requirements"; and annulling, cancelling, and setting aside that portion of the order requiring that appellee be notified and required to cease and desist from further operation in interstate commerce (R. 29–30).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In entering the decree suspending that part of the Commission's order which denies appellee's application for a certificate.

2. In entering the decree annulling and setting aside that part of the Commission's order which requires appellee to cease and desist from all operation in interstate commerce.

3. In holding that, upon the facts found and stated in the Commission's report, Section 206 of the Motor Carrier Act, 1935, made it mandatory upon the Commission to issue to the appellee a certificate of public convenience and necessity.

4. In holding that appellee's operation of the anywhere-for-hire service on June 1, 1935, and thereafter until he abandoned it on May 29, 1936, entitled him under the "grandfather" proviso of said Section 206, to a certificate authorizing the continuance of the Portland-Seattle operation, instituted May 29, 1936, over U. S. Highway 99, for which appellee's application was made to the Commission.

5. In holding that appellee's operation of the anywhere-for-hire service on June 1, 1935, and thereafter until he discontinued it on May 29, 1936, entitled him under said "grandfather" proviso to a certificate authorizing either the re-establishment of all or a part of the abandoned anywhere-for-hire

operation or the continuance of the new Portland-Seattle operation.

6. In holding that the Commission, upon the facts found by it, acted contrary to law in issuing its order denying appellee's application for a certificate and directing that he cease from all operations as an interstate motor carrier.

7. In holding that the Commission was without power to deny appellee's application for a certificate on the ground that the service for which the application was made was not the service conducted by appellee on June 1, 1935.

8. In holding that the Commission was without power to deny appellee's application for a certificate on the ground that he had on May 29, 1936, discontinued the service in which he was engaged on June 1, 1935.

9. In holding that appellee's abandonment of anywhere-for-hire service on May 29, 1936, and his institution on that date of the daily scheduled Portland-Seattle service did not destroy his right under the "grandfather" clause to a certificate authorizing operation of any service over U. S. Highway 99.

10. In holding upon the facts found by the Commission that plaintiff "might well be confined to an 'anywhere-for-hire' service upon U. S. Highway 99 and compelled to cease his 'fixed termini' operation, but he was still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate."

11. In holding that: "The law provides that if any applicant does not qualify as one who was 'in bona fide operation as a common carrier by motor vehicle on June 1, 1935, * * * and has so operated since that time' then the Commission must go further, and find whether or not the applicant qualifies under Section 307."

12. In holding, despite the fact that plaintiff's application was made and the right to the certificate claimed and supported solely under the "grandfather" clause of Section 206, that the Commission acted contrary to law and failed to perform its full duty in merely denying the application as made and in failing to make findings of fact "as to whether the 'proposed service' is or will be required by the present or future public convenience and necessity as required by the latter section, 307 (a)."

13. In holding that the Commission's order was affirmative and not negative, and that it had jurisdiction to review the order.

14. In failing and refusing to hold that the Commission's order is valid and lawful in all respects and in refusing to enter a decree dismissing the bill of complaint.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission lawfully refused to issue appellee a certificate under the proviso of Section 206 (a). It lawfully refused to

issue a certificate authorizing operation as a common carrier of passengers over U. S. Highway 99 between Portland and Seattle, fixed termini and intermediate points, as applied for, because appellee was not so engaged on June 1, 1935. On June 1, 1935, appellee was engaged in special or charter, anywhere-for-hire operations over irregular routes and between no fixed termini. Prior to the enactment of the Motor Carrier Act there was a well-established distinction in the motor carrier industry between such an operation and the regular route, fixed-termini passenger service for which appellee applied. Congress expressly recognized the distinction in the Act. It was not the purpose of Congress to permit an anywhere-for-hire, irregular route carrier, engaged in special or charter operations, to establish regular route, fixed-termini passenger service, without further proof of public convenience and necessity, merely because its motor vehicles continued physical movement over the same route or routes, or in the same territory. An opposite construction of the Act will defeat the express policies of Congress.

It was not incumbent upon the Commission to issue appellee a certificate under the proviso to Section 206 (a) authorizing a re-establishment of any part of the anywhere-for-hire, special or charter operations conducted prior to May 29, 1936, and on June 1, 1935. Appellee on May 29, 1936, discontinued his anywhere-for-hire transportation of spe-

cial groups over irregular routes and thereby voluntarily abandoned his right to a certificate for such service under the proviso. To receive a certificate under the statute an applicant must show not only that it was in *bona fide* operation on June 1, 1935, but that it "has so operated since that time." Section 206 (a). Appellee did not apply for a certificate authorizing operation of an anywhere-for-hire, special or charter service over U. S. Highway 99, and it nowhere appears of record that he desires such a certificate or would be willing to perform such service.

II

The Commission's order is not unlawful because it failed to consider and determine whether the "proposed service * * * is or will be required by the present or future public convenience and necessity" in accordance with the procedure provided for in Section 207 (a) of the Act. The District Court misconstrued the proviso of Section 206 (a). That section does not require the Commission to consider under Section 207 (a) an application which it has denied under Section 206 (a). The construction adopted below would permit continued lawful operation without certificate under exaggerated claims as to operation on June 1, 1935, until public convenience and necessity might be determined, and is contrary to the spirit and purpose of the Act. The construction below imputes to Congress an ignorance of the tremendous adminis-

trative task inherent in the enactment of the statute. Appellee did not apply for a certificate under Section 207 (a) of the Act in the form prescribed by the Commission, nor does the bill of complaint allege that the present or future public convenience and necessity requires his regular operation between Portland and Seattle or that evidence was presented or claim made to the Commission with respect to such an issue.

III

The portion of the Commission's order denying the appellee's application was negative in form and substance and did not direct the appellee to perform or to cease to perform any act; it is, therefore, not the kind of order which the court below could review under the Urgent Deficiencies Act. The denial of the certificate did not subject the appellee to risks or penalties; any risks or penalties to which the appellee may be subject arise not from the order but from the act. That part of the Commission's order which directed that the appellee be notified and required to cease and desist from operation was merely an affirmation of the self-operating provisions of the statute. The appellee's operations without a certificate were illegal under the statute. This provision of the order did not create or increase that illegality. Whether this portion of the Commission's order is reviewable under the Urgent Deficiencies Act depends not upon its form but upon the character of the administrative action

involved. That action was negative in effect, and hence, this provision of the order is not reviewable. Denial of jurisdiction under the Urgent Deficiencies Act does not preclude all judicial review; the appellee has other remedies if the action of the Commission is illegal.

ARGUMENT

I

THE APPELLEE IS NOT ENTITLED TO A CERTIFICATE UNDER SECTION 206 (a) OF THE ACT

Section 206 (a) of the Act provides in effect that no common carrier by motor vehicle, subject to the provisions of the Act, shall engage in any interstate operation unless there is in force with respect to such a carrier a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the operation. The Section contains a proviso which declares that if a carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time" the Commission shall issue the certificate without requiring further proof that public convenience and necessity will be served by the carrier's operation. In *McDonald* v. *Thompson,* No. 55, October Term, 1938, this Court said that this proviso should "be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms."

The appellee is not entitled to a certificate of public convenience and necessity under the proviso to Section 206 (a). He is not entitled to a certificate authorizing him to operate as a common carrier over U. S. Highway 99 between Portland and Seattle, as fixed termini, and intermediate points, because he was not engaged in such an operation on June 1, 1935. He is not entitled to a certificate authorizing him to continue the "anywhere-for-hire" service in which he was engaged on and before June 1, 1935, because by reason of his abandonment of that operation on May 29, 1936, he has failed to continue the operation in which he was engaged on June 1, 1935, as the terms of the proviso require.

A. THE COMMISSION LAWFULLY REFUSED TO ISSUE A CERTIFICATE UNDER SECTION 206 (A) AUTHORIZING APPELLEE TO OPERATE AS A COMMON CARRIER OF PASSENGERS OVER U. S. HIGHWAY 99, AS A REGULAR ROUTE, BETWEEN PORTLAND AND SEATTLE, AS FIXED TERMINI, AND INTERMEDIATE POINTS, AS APPLIED FOR, BECAUSE APPELLEE WAS NOT SO ENGAGED ON JUNE 1, 1935

Appellee applied to the Commission for a certificate under the "grandfather" proviso of Section 206 (a) of the Motor Carrier Act [5] authorizing him to operate as a common carrier by motor vehicle of passengers and their baggage over U. S. Highway 99, between Portland, Oregon, and Seattle, Washington, and intermediate points thereon (R. 2, 6). If he had been able to show that on June 1, 1935, he was in *bona fide* operation as such a carrier and

[5] Appendix A, *infra*, page 56.

had so operated since that time, it would have been the duty of the Commission to issue a certificate authorizing him to so operate "without requiring further proof that public convenience and necessity will be served by such operation." Appellee failed to make this showing.

The undisputed facts show that on June 1, 1935, appellee was not engaged in the transportation of passengers over any regular route or between any fixed termini, and certainly not over U. S. Highway 99, and between Portland and Seattle, and intermediate points. He had not made a trip to Seattle since about 1933 (R. 8). He had never made a trip to most of the intermediate points on U. S. Highway 99 (R. 8), nor had he shown that passengers had ever been transported on return trips to Portland (R. 8). He had made trips to only fourteen points in the State of Washington and many of those points are not located on or near U. S. Highway 99 (R. 8). (See the map in Appendix B.) His trips even to those points were very infrequent. The appellee testified, "Sometimes I didn't go into the State of Washington for a month" (R. 8). In the year 1935 he made only eleven trips to Washington points, the particular points being undisclosed by his evidence (R. 8). The appellee did not publish a tariff but based his charges on the mileage involved on each trip (R. 8).

Indeed, it is debatable whether appellee on and before June 1, 1935, undertook "to transport for

the general public" in accordance with the definition of a "common carrier by motor vehicle" found in Section 203 (a) (14).[6] His service was narrowly restricted to special groups such as employees seeking group transportation from Portland to logging camps in Washington, and baseball and basketball teams (R. 7). The Commission's findings do not disclose whether he held himself out to serve such special groups indiscriminately or whether he transported such groups as a "contract carrier by motor vehicle" pursuant to "special and individual contracts or agreements."[7]

On May 29, 1936, the appellee instituted a service totally different in kind from the service which he had theretofore offered. On that date he instituted a regular daily scheduled bus service over

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[6] This definition follows:

> The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies * * *.

[7] The term "contract carrier by motor vehicle" is defined by Section 203 (a) (15) as follows:

> The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

. S. Highway 99, between Portland and Seattle
nd intermediate points. The service was for the
eneral public and was conducted on a published
ariff fare basis. The appellee used new equipment
nd operated under the trade name "Interstate
usses" which he had not theretofore used.

The appellee contended below that the proviso to
ection 206 (a) does not authorize the Commission
o make any distinction between regular and irreg-
lar routes, regular and irregular service, or any-
here-for-hire and fixed-termini service; that by
eason of the fact that his physical operations were
rried on, at least in part, over U. S. Highway 99
n or before June 1, 1935, the proviso to Section
06 (a) conferred upon him an absolute right to a
rtificate of public necessity authorizing him to
ntinue operations; and that his fixed termini
aily scheduled operation between Portland and
eattle over U. S. Highway 99 was a proper exer-
se of the right so conferred.

The appellants submit that appellee's construc-
on of the Section 206 (a) involves an unwar-
nted extension of the proviso contained therein
nd is in direct conflict with the view of this Court
at the proviso should be "held to extend only
carriers plainly within its terms." *McDonald* v.
hompson, No. 55, October Term, 1938, decided
ecember 5, 1938. Furthermore, this construction
the statute assumes that Congress legislated, if
t in ignorance, at least in disregard of economic

conditions and practices in the industry which it was regulating. Such an assumption is without basis in fact. The Motor Carrier Act, 1935, was enacted after more than a decade of study and after hearings by the Congress on many proposals and bills for the regulation of the industry. Extensive and careful regulation of the industry had been advocated by the Interstate Commerce Commission,[8] and by the Federal Co-ordinator of Transportation[9] after exhaustive studies. The Motor Carrier Act does not represent, as did the first Act to Regulate Commerce enacted in 1887, a cautious and experimental approach to the regulation of a carrier industry. It is an ambitious, comprehensive, and detailed scheme for the control of the motor carrier industry in the public interest.

For many years before the Act was passed there was a clearly recognized distinction in the motor-bus industry between special and charter anywhere-for-hire operations over irregular routes on the one hand and regular route bus operations between fixed termini on the other.[10] In the enactment of

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[8] The Commission had made two extensive investigations of the motor transport industry, *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685 (April 10, 1927) and *Coordination of Motor Transportation*, 182 I. C. C. 263 (April 6, 1932).

[9] *Regulation of Transportation Agencies*, Sen. Doc. 152, 73d Cong., 2d Sess. 1934.

[10] "* * * passenger service operators may be classified as common carriers over regular routes, and carriers engaged in miscellaneous services, such as school, sight-seeing, and charter party." *Coordination of Motor Transportation*,

e Motor Carrier Act, and specifically in establish-
g the exemption of the "grandfather" proviso,
ongress could not have intended to ignore this dis-
nction in transportation service. Proof that it
id not is found in the use of the phrase "over the
oute or routes or *within the territory*" in the pro-
iso of Section 206 (a); in the terms of the proviso
Section 207 that "no such certificate shall be is-
ued to any common carrier of passengers by motor
ehicle for operations over other than a regular
oute or routes, and between fixed termini, except
s such carriers may be authorized to engage in
pecial or charter operations"; in the duty con-
erred upon the Commission by Section 208 (a) to
specify the service to be rendered and the routes
ver which, the fixed termini, if any between which,
nd the intermediate and off-route points, if any,
t which, and in case of operations not over speci-
ed routes or fixed termini, the territory within
hich, the motor carrier is authorized to operate";
nd in the power conferred upon the Commission
Section 204 (c) to "establish such just and rea-
nable classification * * * groups of carriers
cluded in the term 'common carrier by motor ve-
cle,' * * * as the special nature of the serv-
es performed by such carriers * * * shall re-
ire; and such just and reasonable rules, regula-

2 I. C. C. 263, 274. See also *Coordination of Motor Transportation*, Sen. Doc. No. 43, 72d Cong., 1st Sess., pp. 35, and *Regulation of Transportation Agencies*, Sen. c. No. 152, 73d Cong., 2d Sess., pp. 176, 191–192.

tions, and requirements * * * to be observed by the carriers * * * so classified or grouped, as the Commission deems necessary or desirable in the public interest." The terms "regular routes," "irregular routes," "within the territory," "fixed termini," and "special or chartered operation," are words of art familiar to the industry, and had for years prior to the enactment of the Motor Carrier Act been employed in the drafting of state legislation and of the regulations of state commissions to distinguish between the type of service such as that which appellee was furnishing on June 1, 1935, and that which he instituted on May 29, 1936, and for which he sought a certificate.[11]

The difference between these two types of transportation service, long established and well known in the industry and undoubtedly familiar to Congress, is clearly recognized by the language of Section 206 (a). To obtain a certificate under the proviso of that Section a carrier must have been "in bona fide operation as a common carrier by motor vehicle on June 1, 1935"; furthermore, he must have "so operated since that time." If these and the other conditions of the proviso are satisfied, the

[11] By 1933 common carriers of passengers by motor vehicle over "regular routes" were being regulated in 47 states and the District of Columbia. In 34 states and the District of Columbia there was regulation of common carriers of passengers over "irregular routes." *Regulation of Transportation Agencies*, Sen. Doc. No. 152, 73d Cong., 2d Sess., p. 173.

ommission is required to issue to him a certificate, ithout further proof, that public convenience and ecessity will be served "by such operation." The *peration* which the Commission is thus directed to uthorize is the operation in which the carrier was ngaged on June 1, 1935, not some new and different peration initiated subsequent to June 1, 1935, and erving an economic function radically different om the function served by a prior operation.

That this is the correct construction of the statuory language follows from a consideration of the olicy which prompted its enactment. Doubtless he primary reason for conferring a statutory right o a certificate upon a carrier who on and after une 1, 1935, had operated as a common carrier was ast the mere existence and continuation of the peration, without more, raises a presumption that he operation serves public convenience and necesity." But if this presumption is to be indulged, it

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[22] Cf. *Coordination of Motor Transportation*, Senate ocument No. 43, 72nd Congress, 1st Session (ordered to be inted January 6, 1932). Report by Leo J. Flynn to the terstate Commerce Commission (page 99):

> Motor-carrier operators who have pioneered, taken the hazards of the development period, and have established routes and built up traffic should be given just and fair consideration. The fact of continuous bona fide operation for a reasonable period prior to the enactment of regulatory legislation and at the time the application for a certificate is made should be deemed prima facie evidence as to the public convenience and necessity of the operation.

ge 115):

> The law should provide that the fact that an applicant for a certificate of public convenience and

must apply to the service performed on June 1, 1935, and not to a totally different kind of operation. As to the latter operation which was not in existence on June 1, 1935, there can be no presumption that it serves public convenience and necessity and it cannot be assumed that Congress intended to confer an absolute right upon the carrier to conduct that operation.

The adoption of the construction of Section 206 (a) for which appellee contends would seriously impede the accomplishment of the statutory policy. The obvious purpose of requiring a certificate as a condition precedent to operation as a carrier by motor vehicle is to prevent and restrain the kind of unnecessary duplication of facilities and wasteful competition which would prevent the development of an adequate, economical, and efficient service by motor carriers.[13] If the proviso to Section 206 (a)

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necessity was in bona fide operation as a common carrier over the route or between the termini described in the application for a reasonable length of time prior to the enactment of regulatory legislation and continuously to the time application is made has so been in operation should be considered prima facie evidence of the public convenience and necessity of such operation. If satisfactory showing is made that such applicant is able adequately to perform the service required, a certificate should be issued to the applicant without further proceedings.

[13] The Commission, in *Black Hills Transportation Company Common Carrier Application*, 2 M. C. C. 391, 395 (decided July 14, 1937), has construed the legislative purpose as follows:

The most liberal meaning that can be placed on the language used by Congress is that the only operations coming within the scope of the exception are the only

is to be construed so as to confer upon any person who on and before June 1, 1935, performed an intermittent, irregular, anywhere-for-hire service within a certain territory or over part of certain routes an absolute and vested right to establish a regular scheduled service between fixed termini anywhere on those routes or within that territory, irrespective of any considerations of public convenience and necessity, the power of the Commission to deal with the specific problems at which Section 206 (a) is directed will be substantially weakened. For example, a carrier who on June 1, 1935, was conducting sightseeing or other special or charter operations over various irregular routes in several states could lawfully institute regular, fixed-termini, daily scheduled bus service over every route in that territory, even though each one of those routes was and is now being furnished by one or more other carriers with a regular service which satisfied all of the possible requirements of public convenience and necessity. In such circumstances much of the protection which the Section is designed to give against wasteful and unnecessary competition would be illusory.

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operations over such route or routes or within such territory as the transportation services, and other services incidental thereto, rendered in or with good faith, honestly, openly, etc., on June 1, 1935, and since that time, reasonably establish to have been both within the *limits of the transportation business* in which the applicant was actually engaged on that date and within the *limits of the transportation business* in which the applicant has actually engaged since that date. [Italics ours.]

B. THE COMMISSION IS NOT REQUIRED TO ISSUE APPELLEE A CERTIFICATE UNDER SECTION 206 (a) AUTHORIZING A RE-ESTABLISHMENT OF ANY PART OF THE ANYWHERE-FOR-HIRE SERVICE WHICH HE CONDUCTED PRIOR TO MAY 29, 1936, AND ON AND BEFORE JUNE 1, 1935

The court below took the view that although the appellee was not entitled to a certificate authorizing him to carry on the regular scheduled fixed-termini operation in which he is now engaged, the Commission was under a duty to issue to him a certificate authorizing him to re-establish the anywhere-for-hire service which he performed on June 1, 1935.[14] The appellants submit that the court below erred in reaching this conclusion.

1. Appellee did not continue the service in which he was engaged on June 1, 1935, as Section 206 (a) requires

In order to receive a certificate under the "grandfather" proviso without proof of public convenience and necessity, an applicant must show more than that it was in bona fide operation on June 1, 1935. Such an applicant must show that it *"has so operated since that time."*[15] It was not the

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[14] District Judge Fee, writing for the majority of the court, said (R. 17):

> Undoubtedly, the applicant would be confined to the exact service which he was furnishing on June 1, 1935 * * *. So Maher might well be confined to an "anywhere-for-hire" service upon U. S. Highway 99 and compelled to cease his "fixed-termini" operation but he was still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate.

[15] "Except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control." (Section 206 (a), Appendix A, *infra*, p. 56.) There

Congressional purpose to perpetuate a carrier's right to operate as it did on June 1, 1935, unless the carrier had continued thereafter without "interruption" to serve the public by such operation. The mortality rate in the industry prior to the enactment of the Act was notoriously high. The requirement of continuous operation was in furtherance of the policy of Congress, as expressed in Section 202 (a) of the Act, "to promote adequate, economical, and efficient service by motor carriers."

The Commission found that appellee, on May 29, 1936, discontinued the anywhere-for-hire service which he had theretofore been conducting and which he was conducting on June 1, 1935 (R. 8). Assuming that appellee was a common carrier on June 1, 1935, his operations on that date, had they been continued, would have entitled him at most to a certificate authorizing him to engage only in special or charter anywhere-for-hire operations over the irregular routes in the territory which he was serving on June 1, 1935. The Commission did not issue a certificate to the appellee authorizing this kind of an operation because he had not complied with the mandate of the statute that the operation in which he was engaged on June 1, 1935, be continued without interruption. Had appellee not abandoned his June 1, 1935, operation, as he did on

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is no contention here that appellee's discontinuance, on May 29, 1936, of the operations in which he was engaged on June 1, 1935, was beyond his control. The discontinuance was voluntary and deliberate.

May 29, 1936, it would have been the duty of the Commission to determine whether or not on June 1, 1935, he was a common carrier of passengers engaging in special or charter anywhere-for-hire operations over irregular routes, and to have issued or denied him a certificate limited accordingly. The Commission has expressly recognized its right and duty to issue certificates authorizing such operations under the proviso of Section 206 (a) as well as under Section 207 (a).[16]

[16] In *Blue and Grey Sightseeing Tours, Incorporated, Common Carrier Application*, 8 M. C. C. 124 (decided June 23, 1938) the Commission granted a "grandfather" certificate authorizing the applicant to continue round trip pleasure and sight-seeing tours from Washington to Arlington National Cemetery, Annapolis, Mount Vernon and New Market and return and special round trip tours from Washington to various historic places in Delaware, Maryland, New Jersey, Pennsylvania, and Virginia. In *Peninsula Transit Corporation Common Carrier Application*, 1 M. C. C. 440 (decided January 26, 1937), the Commission construed Section 208 (c) of the Act which provides that "any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed." Applicant had "grandfather" rights to transport passengers over certain regular routes and between certain fixed termini, and sought a certificate to so operate and in addition to conduct special or charter parties to any place. Special or chartered party operations constituted a small proportion of applicant's business, averaging perhaps one special trip per day throughout the year and for the most part had been confined to movements between points on applicant's own routes with occasional trips to other points and in other states. Protestants contended that "if

Whatever the situation may have been with respect to the operations of the appellee on or before June 1, 1935, he has not "so operated since that time" so as to be entitled to a certificate under the provisions of Section 206 (a). It is no answer to assert that the statute does not forbid a mere change in the incidents, or extent or scope of, the service which was performed on June 1, 1935. The change which took place in the appellee's service on May 29, 1936, was more than a change in incidents, and more than a change in extent or scope

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charter service is to be specifically authorized in the certificate granted, the authorization should restrict the service to include only the origins, destinations, routes, and frequencies operated on and prior to June 1, 1935. The Commission, giving effect to Section 208 (c), held that no certificate was necessary to authorize applicant to conduct special or charter party operations to any place, that this right was "incidental to the holding of a certificate for the transportation of passengers between fixed te[illegible]ini over a regular route or routes;" but that it could "by special or general rules or regulations impose appropriate limitations as to origin territory." Accordingly, it found that applicant could "transport to any place within the United States, special or chartered parties which originate in the territory served by its routes," the limitation on origin territory being deemed "a special rule prescribed for the purpose of this proceeding and subject to such modification as may be appropriate under any rules or regulations which we may hereafter prescribe." The Commission further said: "Only those common carriers of passengers who are engaged, or propose to engage, exclusively, in the transportation of special or chartered parties are required to obtain a certificate specially authorizing such operations (see proviso of Section 207 (a)). As to such carriers we may issue a certificate only upon the submission of the requisite proof under Section

of service. It was a complete change in the character of the service. The economic function which appellant performed after May 29, 1936, was different from the function which he had performed prior thereto. The kind of competition offered by the appellee to other carriers on the same routes and the same territory was radically different in character after May 29, 1936.

Any construction of Section 206 (a) which ignored the significance of a change of this extent and character would be contrary to the spirit and purpose of the statutory requirement of continuous operation. Such a construction would substitute a bare requirement that motor vehicles

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206 (a) or 207 (a) of the Act, and the scope of the operation must be stated in the certificate." In *Red Star Sightseeing Line, Incorporated, Common Carrier Application*, 1 M. C. C. 521 (decided February 27, 1937) the applicant applied under Section 207 (a) for a certificate authorizing round-trip sightseeing and pleasure tours over irregular routes in a certain territory. It had not operated nor did it seek to operate a regular bus service over any regular routes or between any fixed termini. The Commission said (p. 525): "We have power under Sections 206 and 207 to issue a certificate authorizing a carrier to engage exclusively in the special or charter operation or both, for the transportation of passengers and their baggage over irregular routes, and we conclude that the proposed sightseeing and pleasure-tour operations of applicant are special operations within the meaning of that term as used in the proviso to Section 207 set forth above. Obviously, however, a certificate authorizing applicant to conduct such operations would not carry with it any right to transport in interstate or foreign commerce to any place special or chartered parties under Section 208 (c)."

physically move over the same route or routes in the same territory, for the continuity of economic function and of competitive effect, which are the real circumstances to which the statute looks. The anomalous effect of such a construction as applied to other situations is apparent. Assume that an applicant, who on June 1, 1935, was engaged in transporting sight-seeing parties over irregular routes from the District of Columbia to points in surrounding states, thereafter abandoned such operations, and established over one of its former routes, for example from Washington, D. C., to Baltimore, a regular, daily scheduled passenger operation in competition with established bus lines. The construction adopted by the court below would preserve the applicant's right under Section 206 (a) to resume sight-seeing operations from Washington, D. C., to Baltimore and intermediate points, upon the ultimate denial of a certificate to engage in the regular bus service. Assume the opposite case. A regular bus operator between Washington, D. C., and Baltimore on June 1, 1935, subsequently abandons this regular service and engages in sight-seeing operations or the transportation of chartered parties from Washington, D. C., to points in adjacent states, including Baltimore. Upon the discontinuance of its regular bus service and pending the determination of its application, other carriers may have secured certificates of public convenience and necessity to furnish the transportation services which the applicant had voluntarily refused to con-

tinue. Upon denial of a certificate for the latter service, could it resume regular bus operations from Washington, D. C., to Baltimore without further proof of public convenience and necessity?

Appellee's failure to meet the statutory requirement of continuity of operation cannot be excused on the ground that the change of operation on May 29, 1936, was not in fact a substitution of one type of service for another, but was merely an increase of service or a merger of one service with another. This is not a case of a mere increase of service, and not a case of a lesser service being merged with a greater. Appellee did not on and after May 29, 1936, continue over U. S. Highway 99, with more regularity and more facilities, the same service which he had theretofore conducted. On June 1, 1935, appellee was a sporadic, anywhere-for-hire operator over irregular routes. Sometimes he did not go into Washington for a month (R. 8). In the year 1935 he made only eleven trips to undisclosed points in Washington (R. 8). His service to the public was narrowly restricted. So far as the Commission's findings disclose, he confined himself to employees seeking transportation as a group from Portland to logging camps in the State of Washinton, and to occasional basketball and baseball teams (R. 7). He had not been to Seattle since 1933 (R. 8).

There was no mere merger of operations, no bare increase of service to the public, when on May 29, 1936, he discontinued the sporadic transportation

f these special groups to indiscriminate points in he State of Washington, and began, instead, to perate daily on a fixed schedule between fixed ter- nini, Portland and Seattle and intermediate points n U. S. Highway 99; to serve regularly intermedi- te points which he had never served before (R. 8); o transport passengers in return over the same oute as he had not theretofore done (R. 8); to hold imself out, not to transport special groups of per- ons but to transport the individual members of he public indiscriminately on a published tariff asis.

Appellee did not apply for a certificate authorizing the operation of an anywhere-for-hire, special or charter service over U. S. Highway 99 and it nowhere appears of record that he desires such a certificate or would be willing to perform such a service

It is not incumbent upon the Commission to issue certificate of public convenience and necessity au- horizing a type of service for which application as not been made. This is certainly the case in he absence of a claim therefor on the part of the arrier either at the hearing or by a petition for a re- earing, after entry of the order denying the appli- ation. Otherwise, a certificate might issue to au- horize operations in which the applicant has no esire or intention to engage. Appellee did not ap- ly to the Commission for a certificate authorizing he transportation of special groups of passengers ver U. S. Highway 99, or any part thereof, as he as doing on June 1, 1935, and nowhere of record

does it appear that he claimed or desired such a certificate, or that if it were granted, that he would in fact perform such a service.[17]

II

THE COMMISSION WAS NOT OBLIGATED TO CONSIDER APPELLEE'S APPLICATION UNDER SECTION 207 (a) OF THE ACT AND TO DETERMINE WHETHER THE PROPOSED SERVICE IS OR WILL BE REQUIRED BY THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY

A. THE PROVISIONS OF SECTION 206 (A) OF THE ACT DID NOT REQUIRE THE COMMISSION TO CONSIDER APPELLEE'S APPLICATION UNDER SECTION 207 (A)

Although the appellee in his bill of complaint did not allege that the Commission had erred by failing to consider his application under Section 207 (a) or that he had presented any evidence to the Commission showing that public convenience and necessity would be served by the continuation of his op-

[17] Presumably since the date of the hearing before the Joint Board, November 12, 1936, until the present time, appellee, under claim of right, has continued his regular fixed-termini, daily scheduled operation between Portland and Seattle. The court below, while apparently recognizing that appellee should properly be confined under the "grandfather" clause to "the exact service which he was furnishing on June 1, 1935" (Opinion, R. 17), and only to such part thereof as had not thereafter been abandoned (Opinion, R. 18), nevertheless held that the Commission should have further proceeded to determine whether public convenience and necessity required the service for which appellee contended. Its decree wholly set aside and annulled the Commission's cease and desist order. Nor did the court seek to confine appellee, pending the further determination of the case, to the operations to which in the court's opinion he was entitled under the "grandfather" clause. Thus appellee was left free to continue the questioned operations.

eration, or that, in fact, the continuation of those operations would serve public interest and necessity, the court below held that the Commission erred, because once having determined that the appellee was not entitled to a certificate under the provisions of Section 206 (a), it did not consider his application under Section 207 (a) (R. 18–19).

The lower court based this conclusion on the sentence immediately following the first proviso to Section 206 (a) which reads as follows: "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a) of this part and such certificate shall be issued or denied accordingly." This construction of the language of Section 206 (a) links the "otherwise" clause to the wrong antecedent. That clause becomes applicable, not upon the failure of the applicant to show *bona fide* operation on June 1, 1935, but upon the failure of the applicant to file its application within one hundred and twenty days after the effective date of the section. Its antecedent is the conditional clause "if application for such certificate was made to the Commission * * * within one hundred and twenty days after October 1, 1935."

The generally applicable rule established by Section 206 (a) is that no common carrier by motor vehicle shall operate in interstate commerce without holding a certificate from the Commission. To this general rule, however, Congress by the proviso established an exception for those carriers who (1)

were in *bona fide* operation on June 1, 1935, and (2) have so operated since that time.

A carrier of this class, notwithstanding it holds no certificate, may continue its existing operation pending the determination of its application for a certificate. It is the duty of the Commission to issue a certificate to a carrier of this class without requiring further proof of public convenience and necessity and without further proceedings, *upon the express condition,* however, that application therefor be made within one hundred and twenty days after the effective date of the section. "*Otherwise* (that is to say, if application therefor be not made within the one hundred and twenty day period), the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a). In short, an applicant belonging to the class of carriers excepted from the general rule, who files in time and an applicant who does not are differentiated so far as concerns the character of proof required; the first applicant needs no proof other than its operations, the second requires the sort of proof required for a new operation.[18] But they are alike in the privilege of law-

[18] It should be noted that in *Butcher Contract Carrier Application*, 1 M. C. C. 485, 486–487 (decided February 15, 1937) the Commission, in construing the clause of Section 209 (a), applicable to contract carriers, which is substantially identical with Section 206. (a), held that operation pending determination of an application not filed within the statutory period was lawful. The Commission said:

> This interpretation of the statute commends itself to us not only as justified in law but as evincing a sound policy. It must have been obvious to the Con-

al operation pending the determination of the pplication.

The effect of the lower court's construction of the atute is that an applicant who claims under Sec- on 206 (a) operating rights over a route or routes, r in a territory, to which it is in fact not entitled, ay nevertheless require the Commission to deter- ine whether the "proposed service * * * is r will be required by the present or future public onvenience and necessity," and prior to and pend- g such determination engage in operations. This onstruction imputes to Congress an intention to ncourage indiscriminate expansion of motor car- ier operation prior to determination by the Com- ission that such expansion is required by the resent or future public convenience and necessity. t would tend to encourage exaggerated claims un- er Section 206 (a), and would afford to a carrier aking such claims the right to engage in new com- etitive operations without restraint until ulti-

gress that many operators, for one reason or another, would fail to apply for certificates within 120 days after the effective date of the act. Many of such operators were known to be men of limited experience in business and with Government regulation. The whole policy evidenced in the "grandfather" clause indicates that the Congress did not intend to penalize operators who failed to file within a specified date, beyond requiring proof from them which was dispensed with by those who filed in time. It is in conformity with the declared policy to protect the interest of the public by authorizing the continuance of a transportation system which had been built over a substantial period of time rather than virtually to order its cessation.

mately the question of public convenience and necessity was determined. Such a result cannot be reconciled with the purpose of Congress as expressed in Section 202 (a) to "foster sound economic conditions in such transportation and among such carriers in the public interest," to "prohibit unfair and destructive competitive practices," "to improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers."

The anomalous effect which would follow an adoption of the lower court's construction is well illustrated by the result in the instant case. More than two years ago, appellee inaugurated a regular route daily scheduled fixed termini passenger service between Portland and Seattle. The court below concedes that he was not entitled to do so by virtue of his operations on June 1, 1935 (R. 17, 18). Yet it is held that the Commission must determine whether "the present or future public convenience and necessity" requires the operation, and that pending such determination appellee may lawfully continue. If it is ultimately determined that public convenience and necessity did not require the operation, other carriers serving the same route and territory will have been subjected to competition contrary to the public interest.[19]

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[19] The record does not disclose appellee's specific competitors, but that they exist may be safely presumed from the list of protestants who appeared in opposition to his application (R. 7).

By February 12, 1936, 80,925 applications under he "grandfather" provisos of Sections 206 (a) nd 209 (a) were filed before the Commission; ,647 such applications were filed after February 2, 1936; and by November 1, 1938, 6,792 applica- ons for authority to institute new operations had een filed, a total of 93,364 applications. By No- ember 1, 1938, 20,617 applications had been ap- roved, 42,670 had been denied, dismissed, or with- rawn, leaving 30,077 pending applications.[20]

From these figures, it is apparent that more than 0% of the total number of applications under the roviso to Sections 206 (a) and 209 (a) were based pon erroneous claims as to operation on the tatutory date. Doubtless many of the applications pproved were denied in part because of exag- erated claims. Yet the holding of the court below mputes to the Congress an intention that in all f these cases of refusal, it was incumbent upon he Commission to proceed further and decide hether the present or future public convenience nd necessity required the operation as claimed.

APPELLEE DID NOT APPLY FOR A CERTIFICATE UNDER SECTION 207 (a) AND HIS BILL OF COMPLAINT DOES NOT ALLEGE THAT THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY REQUIRES HIS REGULAR OPERATION BETWEEN PORTLAND AND SEATTLE OR THAT HE MADE ANY CLAIM OR PRESENTED ANY EVIDENCE WITH RESPECT TO THIS ISSUE BEFORE THE COMMISSION

Appellee's claim to a certificate was expressly ased upon alleged rights arising by virtue of his

[20] See 52d Annual Report of the Interstate Commerce ommission, November 1, 1938, page 88.

operations on and before June 1, 1935. He did not apply to the Commission for a determination of whether the present or future public convenience and necessity otherwise required the claimed operation. The form of his application is not of record, but the substance of the claim made in his application is ascertainable from the bill of complaint (R. 2) and from the Commission's report (R. 6). Section 206 (b) of the Act expressly provides that "application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require." The Section 206 (a) proviso expressly provides that a certificate may issue thereunder only "if application for such certificate is made to the Commission as provided in paragraph (b) of this section." The Commission had issued regulations for the filing of applications under Sections 206 (a) and 207 (a), prescribing distinct forms differing as to the allegations of fact to be verified and as to proof of service on interested parties.[21] The Commission's report shows that ap-

[21] Form B. M. C. 2, prescribed by order of the Commission dated October 8, 1935, was "to be used ONLY by common carriers engaged in the transportation of passengers in interstate or foreign commerce in June 1, 1935 * * * and continuously thereafter." It called for verified allegations as to the "grandfather" operation, and the only proof of service called for was that a copy of the application had been filed "with the Board, or Governor, if there is no

pellee filed application under Section 206 (a) (R. 6). While the decisions of the Commission show that it has consistently refused to ignore substantive rights or *bona fide* claims merely because of technical defects in the form or allegations of application under the Act,[22] it nowhere appears of

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Board, of each State within which operations * * * are conducted." Form B. M. C. 9, proscribed by order of the Commission dated October 28, 1935, was "for the use of an applicant who 'desires to commence a new common carrier operation.'" It required that the applicant set forth "the facts and circumstances upon which applicant relies to establish that the service covered by this application is or will be required by the present or future public convenience and necessity." It required proof of service not only upon the State Boards, or Governors, as required by Form B. M. C. 2, but also upon "all motor carriers and all carriers by rail and water, known to applicant, with whose service the operations described in this application are or will be directly competitive."

[22] Thus, in *Tri-State Transit Company of Louisiana, Incorporated, Common Carrier Application*, 1 M. C. C. 215 (November 2, 1936), the Commission permitted an amendment to a "grandfather" application so that, as to one of the routes applied for, it might be treated as one for an extension of operations. In *Bowles Common Carrier Application*, 1 M. C. C. 589 (March 13, 1937) the Commission said (page 590): "* * * we are of opinion that it would be unnecessarily harsh, even assuming that applicant erred in respect to his former status, to grant the prayer of protestants that the application be denied * * *. Equity would seem to demand, rather, that this application be treated as one to institute a new common-carrier operation and not as one to continue a common-carrier operation 'instituted before Section 206 of the Act became effective,' and we shall so treat it. We feel that by such treatment all parties will have been accorded substantial justice, since

record here that appellee ever sought a determination that the present or future public convenience required the claimed operation. So far as the record discloses, appellee adduced no evidence on the issue. His bill of complaint does not allege either that such evidence was submitted or that it could have been. The bill of complaint does not allege as an affirmative fact that the present or future public convenience requires the operation, nor does it complain on the ground that the Commission failed to make a finding with respect thereto. At the hearing in the court below appellee did not attack the Commission's order for failure to make such a determination. In these circumstances no basis exists for attacking the Commission's order because the Commission failed to make a finding on an issue which the record discloses was never submitted to it.

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applicant will not thereby be relieved of the burden of proving public convenience and necessity." In *Motor Convoy, Incorporated, Contract Carrier Application*, 2 M. C. C. 197 (June 15, 1937), application under the "grandfather" proviso was treated as one for new operations, where it appeared that the parties had "fully presented their evidence as to this issue." However, issuance of a permit was "withheld for 30 days after service of the report in order that any protestant or other interested party, who may be taken by surprise, may have opportunity to petition for rehearing or reconsideration under our rules. By proceeding in this manner, unnecessary further hearing may be avoided without prejudice to the rights of any one" (page 203). See also, *Jaax Common Carrier Application*, 1 M. C. C. 597, 599 (March 18, 1937); *Michael Common Carrier Application*, 3 M. C. C. 617, 619–621 (December 2, 1937).

III

THE DISTRICT COURT HAD NO JJURISDICTION UNDER THE URGENT DEFICIENCIES ACT TO REVIEW THE ORDER OF THE INTERSTATE COMMERCE COMMISSION

The operative provisions of the order entered by the Interstate Commerce Commission follow (R. 9–10):

> It is ordered that said application be, and it is hereby, denied, effective December 10, 1937.
>
> And it is further ordered that applica. be, and he is hereby, notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle.

Under the provisions of the Urgent Deficiencies Act, c. 32, 38 Stat. 208, 219–220, 28 U. S. C. 47, the jurisdiction of a three judge District Court extends only to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

The first paragraph of the Commission's order, which denies the appellee's application for a certificate of convenience and necessity, is clearly negative in form and substance and, under the decisions of this Court is not reviewable by a three-judge court convened pursuant to the provisions of the Urgent Deficiencies Act.[23] *Piedmont & Nor.*

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[23] Section 205 (h) of the Motor Carriers Act provides in part as follows:

Ry. v. *United States*, 280 U. S. 469; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412; and see *Procter & Gamble* v. *United States*, 225 U. S. 302; *Shannahan* v. *United States*, 303 U. S. 596; *United States* v. *Griffin*, 303 U. S. 226.

That part of the Commission's order which denied the application for a certificate does not direct the appellee to perform any act; it is not the kind of order which the Commission could itself enforce against the appellee, nor does it impose any penalties upon the appellee or, by itself, subject the appellee to the risk of criminal prosecution. The denial of the certificate although in form an order is, in fact, nothing more than a determination that the petitioner had failed to establish facts which would bring him within the scope of the proviso to Section 206 (a). Once the Commission has determined, in the manner authorized by the Act, that the petitioner does not fall within the statutory classification, the provisions of the statute which

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* * * where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under the Urgent Deficiency Appropriations Act, October 22, 1913, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

This provision has no application to the instant case. The Commission here did not base its order on any supposed lack of power or jurisdiction. Nor did the appellee in his bill of complaint pray for mandatory relief.

prohibit and penalize operations without a certificate come into effect. However, the risks to which the appellee then becomes subject are not imposed by the Commission's order as such, but by the provisions of the Act. Cf. *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412, 414.[24] *Piedmont & Nor. Ry.* v. *United States*, 280 U. S. 469, 476–477.

It is significant, furthermore, that a decree annulling, setting aside, or suspending the Commission's order denying a certificate will not in fact afford the appellee any real protection against the risks which he seeks to avoid. Section 206 (a) prohibits operations without a certificate of public convenience and necessity. The appellee now has no certificate. If in fact the appellee does not fall within the class of carriers defined by Section

[24] The court below appears to have taken the view that the order denying the application for a certificate, considered by itself, imposed certain obligations and penalties on the appellee, because as long as the application was pending the appellee would have the legal right to operate without fear of incurring penalties. This is not a correct construction of Section 206 (a). The provisions of that Section permit lawful operation without a certificate pending application by a carrier who was in *bona fide* operation on June 1, 1935, and has so operated since that time. It does not extend this privilege to a carrier who had not, in fact, so operated, merely because his application is pending. To construe the section otherwise would be to permit a carrier who was not in *bona fide* operation on June 1, 1935, or who had not continued such operation, to escape the general prohibition against operating without a certificate and the statutory penalties provided for its violation by the device of claiming non-existing rights.

206 (a), he is subject to all the risks imposed upon him by this prohibition and the other provisions of the Act, and these risks flow from the Act and not from the order. The only effective and final relief which the three-judge court could give to protect the appellee in fact against these risks would be either to issue a mandatory injunction compelling the Commission to issue to the petitioner a certificate of public convenience and necessity, or to hand down a declaratory judgment that the appellee was entitled to such a certificate. That a three-judge District Court convened under the provisions of the Urgent Deficiencies Act has no authority to grant such relief, is established beyond doubt. *Chicago Junction Case,* 264 U. S. 258, 264; *Piedmont & Nor. Ry.* v. *United States,* 280 U. S. 469, 477.

It is true that the court below attempted to give the appellee a kind of indirect affirmative relief by suspending that part of the order which denied a certificate "until such time as the Commission, either upon further hearing, or upon the record now in its possession, grants to this plaintiff a certificate delimited under the terms of the statute, or denies a certificate in conformity with the statutory requirements * * *." This part of the decree of the court below does not, however, direct the Commission to issue a certificate to appellee, nor does it purport to confer an absolute right upon the appellee to a certificate. There is no command in the decree for the Commission to obey or

disobey. The court below has expressed its opinion as to the significance of the facts before the Commission and as to the applicable law, but this amounts to nothing more than a declaratory judgment—a kind of relief which appellee did not seek, and which the three-judge court had no jurisdiction to give. The court below apparently believed that the effect of this decree was to revive the application of appellee which had theretofore been denied and thus to give to him the measure of protection which follows from the provision of the statute which permits a carrier who falls within the terms of Section 206 (a) to operate pending the determination of an application filed with the Commission. Assuming that the effect of the lower court's decree is to revive the application of the appellee, the fact remains that the protection which is afforded to him by the pendency of that application is neither absolute nor unlimited. He still runs the risk of criminal penalties fixed by the Act if, in fact, he is not one of the class of carriers covered by Section 206 (a). And there can be no doubt of the right of the United States in a proceeding brougnt to impose the criminal penalties provided for in the Act to assert and prove that the appellee does not fall within that class of carriers.

Even if the provision of the order denying appellant a certificate is regarded as fixing his status under the provisions of the Motor Carrier Act and thus fixing upon him certain obligations imposed

by the Act, it is, nevertheless, not reviewable by the court below. The determination of a status or similar matter is "not action subject to review under the Urgent Deficiencies Act, even if disregard of the determination may subject the carrier to criminal prosecution." *Shannahan* v. *United States*, 303 U. S. 596, 602. *Cf. Lehigh Valley R. Co. v. United States*, 243 U. S. 412.

The provision of the Commission's order denying the application for a certificate being negative in form and substance when considered by itself, the question remains whether the second provision of the Commission's order which directs that the appellee be "notified and required" to cease and desist from operating as a common carrier is reviewable by a three-judge District Court, and if it is, whether that fact brings the entire order of the Commission within the jurisdiction of the court. This provision of the order, in fact adds nothing to the provisions of the statute or to the risks imposed thereby. The duty of the appellee to cease and desist from further operation is not governed or established by any part of the Commission's order. The provision of the order notifying and requiring appellee to cease and desist must necessarily be based upon the illegality of appellee's present operations from their inception, and that illegality arises neither by reason of the order denying the appellee a certificate nor by reason of the order requiring him to cease and desist. The illegality arises by reason of the fact that the appellee does

not fall within the terms of the proviso to Section 206 (a), and no part of the order of the Commission can subtract from, or increase, that illegality. Viewed in this light, the cease and desist portion of the order is no more than an affirmation of self-operative provisions of the statute which had rendered appellee's operations illegal from their inception. The purpose and effect of this portion of the order, under these circumstances, is no more than to advise the appellee of his present violation and to admonish him against its continuation. Furthermore, the decree of the court below annulling, cancelling, and setting aside this portion of the Commission's order affords the appellee no final protection against the penalties prescribed by the Act; if in fact he does not belong in the class of carriers defined by Section 206 (a), he is subject to those penalties irrespective of the Commission's order.

The fact that the second paragraph of the Commission's order takes the form of notifying and requiring the appellee to cease and desist is not decisive as to the character of the Commission's action. That character can properly be determined in the end only by an analysis of the effect of the Commission's action. It can hardly be supposed, for example, that in *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412, the court would have held that the order was reviewable if it had not merely denied the petition of the Lehigh Valley Transportation Company but had also added a

paragraph requiring the railroad company to abandon or to surrender its ownership in the common carrier by water there involved. In *Shannahan* v. *United States*, 303 U. S. 596, the Supreme Court held that a determination by the Interstate Commerce Commission that a railway was not "a street interurban or suburban electric railway" within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act was not reviewable by a three-judge court even though in that case the Commission's order not only found that the carrier was ineligible under the exemption, but added that it was "therefore subject to the provisions of the Act." The appellants submit, therefore, that whatever view may be taken of the form of the second paragraph of the Commission's order, it is negative in substance, and not properly subject to review by the court below.

Denial of jurisdiction under the Urgent Deficiencies Act does not preclude all judicial review. *United States* v. *Griffin*, 303 U. S. 226. By the terms of the proviso to Section 206 (a) a positive duty is imposed upon the Commission. It is not provided that upon proof of "grandfather" operation a carrier is "entitled to a certificate." It is provided that if the required facts exist, the Commission "shall issue such certificate." Where, upon the evidence introduced before the Commission, its duty to issue such a certificate is "beyond peradventure clear" (*Kansas City Union Station Case*, 294 U. S. 50, 60) the remedy, in case of fail-

ure to comply with the duty, would be by way of mandamus.[23] Cf. *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission*, 252 U. S. 178. Pending determination of such mandamus proceeding, the applicant could doubtless secure protection from unlawful interference with its operations by resort to equitable injunction against the bringing of criminal actions (Cf. *Shields* v. *Utah Idaho Central R. R. Co.*, No. 28, October Term, 1938; 59 S. Ct. 160), or by resort to other equitable relief.

CONCLUSION

It is respectfully submitted that the decree of the lower court should be reversed.

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Solicitor General.

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ELMER B. COLLINS,
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Special Assistants to the Attorney General.

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Interstate Commerce Commission,
Of Counsel.

JANUARY 1939.

[23] Cf. *Federal Rules of Civil Procedure*, Rule 81 (b).

APPENDIX A

The pertinent provisions of the Motor Carrier Act, 1935, c. 498, 49 Stat. 543 (U. S. C. Sup. I, Title 49, Chapter 8) read as follows:

SEC. 202.[1] (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

* * * * *

SEC. 203. (a) As used in this part—

* * * * *

[1] The designation of the sections of the Act will follow the numeration found in the statute as enacted (Act of August 9, 1935, c. 498, 49 Stat. 543, Secs. 201–227) rather than the numeration adopted in the Code (U. S. C. Sup. I, Title 29, Secs. 301–327).

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

(15) The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

SEC. 204. (a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications, and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications, and maximum hours of service of employees, and safety of operation and equipment.

* * * * *

(6) To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

* * * * *

(7) (c) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle," or "contract carrier by motor vehicle," as the special nature of the services performed by such carriers or brokers shall require, and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

* * * * *

SEC. 205 (b) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administra-

tion of this part with respect to such operations: Applications for certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by motor carriers or brokers of the requirements established under section 204 (a); and complaints as to rates, fares, and charges of motor carriers or the practices of brokers: *Provided, however,* That if the Commission is prevented by legal proceedings from referring a matter to a joint board, it may determine such matter as provided in paragraph (a) of this section. The Commission, in its discretion, may also refer to a joint board any investigation and suspension proceeding or other matter not specifically mentioned above which may arise under this part. The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are proposed to be conducted: *Provided,* That the Commission may designate an examiner or examiners to advise with and assist the joint board under such rules and regulations as it may prescribe. In acting upon matters so referred joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are hereinbefore vested in members or examiners of the Commission while acting under its orders in the administration of this part. Orders recommended by joint boards shall be filed with the Commission and shall become orders of the Commission and become effective in the same manner, and shall be subject to the same procedure,

as provided in the case of orders recommended by members or examiners under this section.

* * * * *

(h) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I: *Provided*, That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under the Urgent Deficiency Appropriations Act, October 22, 1913, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

* * * * *

SEC. 206. (a) No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to Section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation

on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

SEC. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such

carriers may be authorized to engage in special or charter operations.

* * * * *

SEC. 208. (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

SEC. 209. (a) No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such

permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further,* That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

* * * * * *

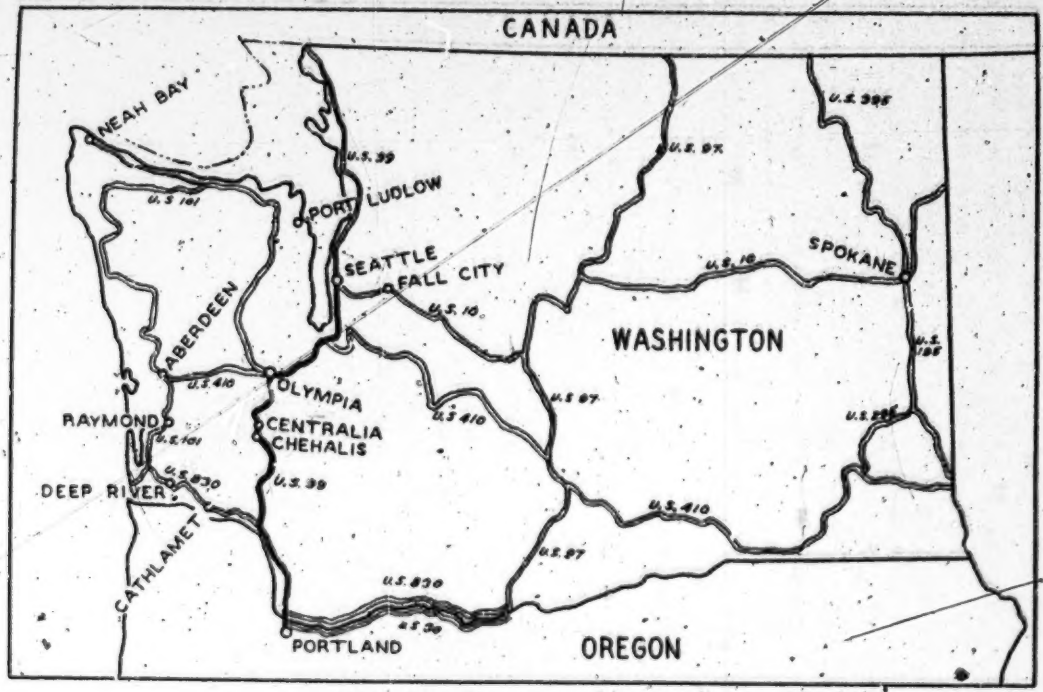
SEC. 222. (a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

(b) If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges, and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition, and enjoining upon it or them obedience thereto.

* * * * *

SEC. 227. (a) This part (except this section, which shall become effective immediately upon approval) shall take effect and be in force on and after the 1st day of October 1935: *Provided, however,* That the Commission shall, if found by it necessary or desirable in the public interest, by general or special order, postpone the taking effect of any provision of this part to such time after the 1st day of October 1935, as the Commission shall prescribe, but not beyond the 1st day of April 1936.

APPENDIX B



POINTS IN STATE OF WASHINGTON

To which appellee made trips "at various times between 1933 and 1936" (R. 8), the points "La Salle River and Greenwood could not be located by map or atlas, and are not shown.

U. S. GOVERNMENT PRINTING OFFICE: 1939